

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

PATRICIA WARD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 07-691 SLR
	)	
CATHOLIC CEMETERIES, INC.,	)	JURY TRIAL DEMANDED
	)	
Defendant.	)	

**MOTION TO DISMISS FOR FAILURE TO COOPERATE WITH  
DISCOVERY, OR, IN THE ALTERNATIVE TO COMPEL DISCOVERY**

Defendant, Catholic Cemeteries, Inc., by and through its undersigned counsel and pursuant to Rules 30 and 37 of the Federal Rules of Civil Procedure, respectfully requests that the Court enter an Order dismissing Plaintiff's Complaint for failure to cooperate in discovery. In the alternative, Defendant requests an Order compelling Plaintiff to appear for her deposition and for an award of associated costs and expenses, including attorney's fees. In support of this Motion, Defendant represents as follows:

1. Plaintiff initiated the above captioned action against Defendant on November 2, 2007. (D.I. 1). This Court approved the parties' proposed Scheduling Order on January 15, 2008. (D.I. 8). Discovery began in March, 2008 and is scheduled to end July 31, 2008. (D.I. 8).
2. On May 6, 2008, Defendant noticed Plaintiff's deposition for June 6, 2008. (D.I. 15).
3. On June 3, 2008, Defendant re-noticed Plaintiff's deposition for June 24, 2008. (D.I. 16). As discussed in more detail in Defendant's Motion to Compel Responses to Discovery filed on Friday, July 25, 2008 (D.I. 21), the postponement of Plaintiff's deposition was due to Plaintiff's failure to respond to discovery requests.

4. On June 23, 2008, Defendant's counsel wrote Plaintiff's counsel indicating that the Plaintiff's deposition (scheduled for June 24, 2008) was postponed because of Plaintiff's failure to respond to outstanding discovery requests. (Ex. A).

5. Later in the afternoon of June 23, 2008, apparently unaware that Defendant had already postponed the Plaintiff's deposition, counsel for Plaintiff requested that the deposition be rescheduled due to counsel's personal circumstances. In addition, counsel further provided he would accommodate defendant's counsel's schedule in "re-setting a date for Ms. Ward's deposition." (Ex. B).

6. On July 11, 2008, Defendant re-noticed Plaintiff's deposition for July 28, 2008. (D.I. 18).

7. As a result of Plaintiff's failure to cooperate in discovery, Defendant, through counsel, filed a Motion to Compel Responses to Discovery on Friday, July 25, 2008. (D.I. 21).

8. At approximately 3:15 a.m. on the morning of July 28, 2008 (the day of the properly noticed deposition of Plaintiff), Defendant's counsel received an email from Plaintiff's counsel requesting that Defendant "suspend the deposition until we complete the discovery responses. I hope to complete them this week". (Ex. C).

9. By reply email to Plaintiff's counsel, Defendant's counsel advised that he would not suspend the Plaintiff's deposition. Defendant's counsel further noted: "Corresponding with opposing counsel at 3:15 in the morning on the day of a scheduled deposition, absent some sort of emergency circumstances, is absurd. I expect to see you, and your client, promptly at 9:30 this a.m. If you do not appear be advised that- in light of your pattern of non-cooperation in discovery- I will file a second Rule 37 motion seeking the Court's

assistance to (a) compel Ms. Ward to appear for her deposition, or alternatively, (b) the dismissal of this action, with prejudice. I will, of course, also seek fees/costs from you.” (Ex. C).

10. On July 28, 2008, at approximately 10:00 a.m., after having waited one-half hour, Defendant’s counsel proceeded with the deposition of Plaintiff and noted, for the record, Plaintiff’s proper notice and failure to appear. (Ex. D).

11. Under Rule 30 of the Federal Rules of Civil Procedure, a plaintiff is required to appear for a properly noticed deposition unless the plaintiff files a Motion for a Protective Order. As noted above, and in the previous Motion to Compel Responses to Discovery (D.I. 21), Defendant repeatedly contacted Plaintiff’s counsel in an effort to obtain discovery responses and schedule the Plaintiff’s deposition in the instant matter. Plaintiff had more than sufficient notice that her deposition would be taken on July 28, 2008. Yet, she failed to appear for the deposition and did not file a protective order.

12. As evidenced by the supporting documentation and Defendant’s Motion to Compel Responses to Discovery, Plaintiff’s failure to appear for her deposition is part of a broader pattern of discovery abuse in the instant matter. In addition, the same pattern of behavior has also evidenced itself in the mediation process. As per the Court’s Scheduling Order (D.I. 8), the instant matter was assigned to Magistrate Judge Stark for mediation. Paragraph 4 of the Order Governing Mediation Conferences and Mediation Statements, entered on February 1, 2008 (D.I. 10), provided that confidential mediation statements were due by July 8, 2008. Defendant submitted a timely confidential mediation statement on July 8, 2008. Plaintiff did not submit a confidential mediation statement. Having not received a confidential mediation statement from the Plaintiff, Magistrate Stark ordered a teleconference for July 18, 2008 at 10:00 a.m. to discuss the mediation conference which was scheduled to take place on July 22, 2008. (D.I. 19). Defendant’s counsel was asked to initiate the call. Defendant’s counsel, despite

several attempts, was unable to reach Plaintiff's counsel, and Plaintiff's counsel did not participate in the July 18, 2008 teleconference which cancelled the mediation conference for the instant matter.

13. Plaintiff's repeated failure to cooperate in discovery is inexcusable. The Court should dismiss her Complaint as a result of her willful failure to cooperate with discovery. *See Torres v. Amerada Hess Corp.*, 2007 U.S. App. LEXIS 17109 (3<sup>rd</sup> Cir. 2007). In the alternative, Plaintiff should be compelled to appear for her deposition when noticed by Defendant and Defendant should be awarded its reasonable attorney's fees and costs. *See Al Barnett & Sons, Inc. v. Outboard Marine Corp.*, 611 F.2d 32, 35-36 (3<sup>rd</sup> Cir. 1979) (authorizing sanctions including dismissal of Plaintiff's claims for failing to appear for properly-noticed depositions).

WHEREFORE, Defendant respectfully requests that the Court enter an Order dismissing Plaintiff's Complaint for Failure to cooperate in discovery, or in the alternative, order Plaintiff to appear for her deposition and award Defendant its reasonable attorney's fees and costs incurred in connection with the preparation of this Motion.

YOUNG CONAWAY STARGATT  
& TAYLOR, LLP

/s/ Michael P. Stafford, Esquire  
Anthony G. Flynn, Esquire (I.D. #74)  
Michael P. Stafford, Esquire (I.D. #4461)  
The Brandywine Building  
1000 West Street, 17<sup>th</sup> Floor  
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Attorneys for Defendant

Dated: July 28, 2008

# EXHIBIT A

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MARGARET M. DIBIANCA  
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KATHALEEN MCCORMICK  
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SENIOR COUNSEL  
CURTIS J. CROWTHER

OF COUNSEL  
BRUCE M. STARGATT  
STUART B. YOUNG  
EDWARD B. MAXWELL, 2<sup>ND</sup>  
JOSY W. INGERSOLL

June 23, 2008

**BY HAND DELIVERY**


Herbert G. Feuerhake, Esquire  
521 West Street  
Wilmington, DE 19801

Re: Ward v. Catholic Cemeteries, Inc.  
C.A. No: 07-691-SLR

Dear Herb:

On behalf of defendant Catholic Cemeteries, Inc., I write to follow up on discovery-related issues raised in my previous correspondence to you dated May 19, 2008 and June 3, 2008. As of this writing, I have not received a response from you to either of the aforementioned letters. Both letters informed you that we had not received responses to the interrogatories or requests for production of documents which we previously served on you. Since you have failed to respond to our requests, I have no alternative but to file a Motion to Compel. Given that you have failed to respond to our discovery requests, we will not proceed with plaintiff Patricia Ward's deposition tomorrow (June 24, 2008) as planned. We will re-notice Ms. Ward's deposition for a subsequent date/time after we have received responses to our discovery requests from you.

Sincerely,

  
Michael P. Stafford

MPS:mmcm

# EXHIBIT B

The Law Office  
of  
**HERBERT G. FEUERHAKE**

*A Professional Association*

521 WEST STREET  
WILMINGTON, DE 19801  
(302) 658-6101

E-Mail: herblaw@verizonmail.com

HERBERT G. FEUERHAKE, ESQ.  
MEMBER OF DE & CT BARS

FACSIMILE TRANSMISSION  
(302) 658-6105

BY FAX ONLY

June 23, 2008

Michael Stafford, Esq.  
Young Conaway Stargatt & Taylor LLP  
1000 West St. 17<sup>th</sup> Floor  
Wilmington, Delaware 19801

**Re: Ward v. Catholic Cemeteries, No. 07-691-SLR**


Dear Michael:

I would appreciate the rescheduling of tomorrow's deposition of Patricia Ward. I will be having laser surgery on my right eye, in an effort to correct an ongoing problem with a detached retina that I suffered last September.

I expect to provide you with discovery responses soon, perhaps by Friday or early next week. I will accommodate your schedule in re-setting a date for Ms. Ward's deposition.

Thank you for your consideration in this matter.

Very truly yours,

  
Herbert G. Feuerhake, Esq.



# EXHIBIT C

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**From:** Stafford, Michael  
**Sent:** Monday, July 28, 2008 9:23 AM  
**To:** 'Herbert Feuerhake'  
**Subject:** RE: Pat Ward  
**Importance:** High

Mr. Feuerhake, I am not willing to suspend Ms. Ward's deposition scheduled for this morning at YCST. As you are aware, the close of discovery in this case is Thursday, July 31st. Therefore, there is not enough time to reschedule Ms. Ward's deposition before the discovery cut-off. Also, I address this issue in my Motion to Compel. I have asked the Court to permit a continuance of her deposition (beyond the close of discovery) to address any issues that may arise from your production/interrogatory responses. I must also note that, despite the fact that the deposition was properly noticed on July 11th, you neglected to correspond with me, at all, about rescheduling or postponing it until the email below which was apparently sent at 3:15 this very morning. Corresponding with opposing counsel at 3:15 in the morning on the day of a scheduled deposition, absent some sort of emergency circumstances, is absurd. I expect to see you, and your client, promptly at 9:30 this a.m. If you do not appear be advised that- in light of your pattern of non-cooperation in discovery- I will file a second Rule 37 motion seeking the Court's assistance to (a) compel Ms. Ward to appear for her deposition, or alternatively, (b) the dismissal of this action, with prejudice. I will, of course, also seek fees/costs from you.

REDACTED

Michael P Stafford  
Young Conaway Stargatt & Taylor, LLP  
The Brandywine Building  
1000 West Street, 17th Floor  
P.O. Box 391  
Wilmington, DE 19899-0391  
Phone: 302-571-6553  
Facsimile: 302-576-3470  
mstafford@ycst.com

---

**From:** Herbert Feuerhake [mailto:herblaw@verizonmail.com]  
**Sent:** Monday, July 28, 2008 3:15 AM  
**To:** Stafford, Michael  
**Subject:** Pat Ward

Mike:

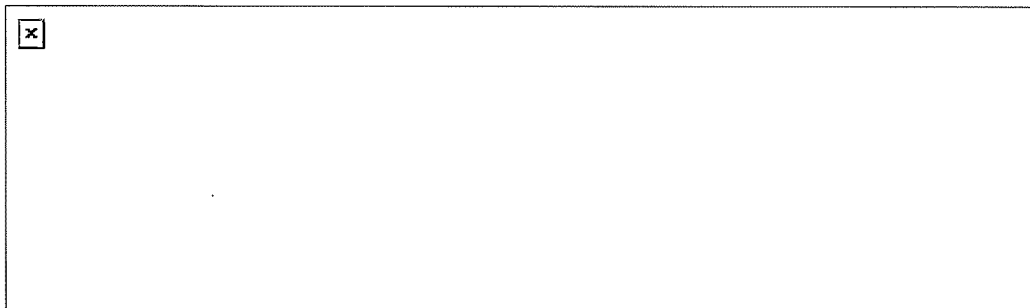
In view of the pending motion and the need to get discovery done before a meaningful deposition of Ms. Ward, I think that we should suspend the deposition until we complete the discovery responses. I hope to complete them this week.

7/28/2008

Thank you,

Herb Feuerhake

--



7/28/2008

# EXHIBIT D



**In The Matter Of:**

**Ward v. Catholic Cemeteries, Inc.**

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**Ward, Patricia**

**C.A. # 07-691 SLR**

**July 28, 2008**

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**Wilcox & Fetzer, Ltd.**  
**Phone: 302-655-0477**  
**Fax: 302-655-0497**  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

PATRICIA WARD,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 07-691 SLR
	)	
CATHOLIC CEMETERIES, INC.,	)	
	)	
Defendant.	)	

Statement for the record pursuant to  
notice at the law offices of Young, Conaway,  
Stargatt & Taylor, LLP, 1000 West Street,  
Wilmington, Delaware, beginning at 10:00 a.m., on  
Monday, July 28, 2008, before Vincent J. Bailey,  
Registered Professional Reporter and Notary  
Public.

APPEARANCES:

MICHAEL P. STAFFORD, ESQ.  
YOUNG, CONAWAY, STARGATT & TAYLOR, LLP  
1000 West Street, 17th Floor  
Wilmington, Delaware 19899  
For the Defendant

WILCOX & FETZER  
1330 King Street - Wilmington, Delaware 19801  
(302) 655-0477  
www.wilfet.com

1 (Deposition Exhibit Nos. 1 and 2  
2 marked for identification.)  
3

4 MR. STAFFORD: We are here this  
5 morning for the deposition of Patricia Ward in  
6 the matter of a Patricia Ward versus Catholic  
7 Cemeteries, Inc.

8 Defendant's Exhibit 1 has already  
9 been marked. Exhibit 1 is a renote of  
10 deposition for Ms. Ward. The notice of  
11 deposition was filed on July 11, 2008. Notice  
12 clearly indicates that the deposition will be  
13 taken here at the offices of Young, Conaway,  
14 Stargatt & Taylor, on Monday, July 28, 2008,  
15 commencing at 9:30 a.m.

16 We have also marked as Defendant's  
17 Exhibit 2 an e-mail that I received from Herb  
18 Feuerhake, the plaintiff's counsel, at 3:15 in  
19 the morning, today, Monday, July 28th.  
20 Essentially in the e-mail Mr. Feuerhake requests  
21 that the deposition be suspended until he  
22 provides his delinquent discovery responses.

23 I wrote back to Mr. Feuerhake shortly  
24 after 9:00 this morning after reading his e-mail

1 and indicated to him that we intended to proceed  
2 with Ms. Ward's deposition today at 9:30. I also  
3 noted that this issue had been discussed in our  
4 pending motion to compel and that we had not  
5 agreed to suspend or postpone this deposition.

6 I also indicated to Mr. Feuerhake  
7 that if he and his client did not appear, we were  
8 going to seek the Court's assistance to compel  
9 their appearance by filing a second Rule 37  
10 motion.

11 It is now shortly after 10:00 a.m.  
12 Neither Mr. Feuerhake or Ms. Ward have appeared  
13 for this deposition and, therefore, we are going  
14 to bring it to a conclusion and move forward with  
15 our motion to compel.

16 (The statement concluded at  
17 10:02 a.m.)  
18  
19  
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I N D E X

E X H I B I T S

DEPOSITION EXHIBITS

MARKED

1 and 2

2

1 State of Delaware )  
2 County of New Castle )

3  
4  
5 C E R T I F I C A T E

6 I, Vincent Bailey, Registered Professional  
7 Reporter, do hereby certify that the foregoing  
8 record, pages 2 to 5 inclusive, is a true and  
9 accurate transcript of my stenographic notes  
10 taken on Monday, July 28, 2008, in the  
11 above-captioned matter.

12 IN WITNESS WHEREOF, I have hereunto set my  
13 hand and seal this 28th day of July, 2008,  
14 at Wilmington.

15  
16   
17

18  
19 Vincent Bailey  
20 Certification No. 171-RPR  
21 (Expires January 31, 2011)  
22  
23  
24

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

PATRICIA WARD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 07-691 SLR
	)	
CATHOLIC CEMETERIES, INC.,	)	JURY TRIAL DEMANDED
	)	
Defendant.	)	

**STATEMENT OF COMPLIANCE PURSUANT TO LOCAL RULE 7.1.1**

Counsel for Defendant Catholic Cemeteries, Inc. hereby certifies that pursuant to Local Rule 7.1.1, I have conferred with counsel for the Plaintiff in a good faith effort to resolve this discovery dispute set forth in the foregoing Motion.

YOUNG CONAWAY STARGATT  
& TAYLOR, LLP

/s/ Michael P. Stafford, Esquire  
Anthony G. Flynn, Esquire (I.D. #74)  
Michael P. Stafford, Esquire (I.D. #4461)  
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Email: aflynn@ycst.com; mstafford@ycst.com  
Attorneys for Defendant

Dated: July 28, 2008

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

PATRICIA WARD,

Plaintiff,

V.

CATHOLIC CEMETERIES, INC.,

Defendant.

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Civil Action No. 07-691 SLR

## JURY TRIAL DEMANDED

## ORDER

NOW, THEREFORE, having considered the above-captioned Defendant's Motion to Dismiss for Failure to Cooperate with Discovery, IT IS NOW HEREBY ORDERED this \_\_\_\_ day of \_\_\_\_\_ 2008, as follows: Defendant's Motion to Dismiss for Failure to Cooperate with Discovery is GRANTED.

Sue L. Robinson, United States District Judge